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Supreme Court, U.S.
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No. 92-1282

In The

Supreme Court of the United States

October Term, 1992

R. E. LUSTER, BERNARD F. ARENAS, III, DAVID K. CARGILL, ELMER V. CLAPS, JAMES P. COLE, DAVID E. DODRILL, DR. JOHN DRAMMIS, JR., DONALD F. AND MARGARET M. GARRETT, RICHARD W. AND RUTH M. HAACK, BRADLEY O. HOLM, L. I. INVESTMENT CLUB TRUST #3, DR. READ LEWIN, DR. BARRY J. and LINDA L. KRAYNACK, WOODROW S. PATTERSON, KENNETH L. SALSMAN, REBECCA THOMPSON, THEODORE R. THOMPSON, PAUL TILLOTSON, GEORGE and VIRGINIA L. UDALL, CHARLES D. WARREN, B. E. WEBB, FRANK L. WEY, and JOHN V. ZEMAN,

Petitioners,

v.

WALTER HUMBERT CUSHMAN, III,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The facts relevant to consideration of the Petition for Certiorari are found in the opinion of the Bankruptcy Judge (Appendix C, Pet. Cert.). Arranged in chronological order they are:

1986 – April 27, 1987 –

Knightsbridge Petroleum Corporation ("Knightsbridge") sold various mineral interests to the Petitioners at a time when Respondent was its chief executive officer.

May 1, 1987 –

Knightsbridge filed for reorganization under Chapter 11. Petitioners are all scheduled as claimants in that proceeding.

July 7, 1987 –

Petitioners served Respondent in a separate action for damages. Knightsbridge was an unserved defendant.

1987 –

Petitioners filed a Motion to Lift Stay in the Bankruptcy Court for permission to continue their suit against Knightsbridge, but later withdrew the Motion.

Petitioners filed their Proofs of Claim in the Knightsbridge reorganization proceeding.

October 21, 1987 –

Knightsbridge served upon Petitioners and their attorney the Disclosure Statement, the proposed Plan of Reorganization, the Order Approving

the Disclosure Statement and Setting the Deadlines for Objection to Confirmation.

January 5, 1988 –

Petitioners took a Default Judgment against Respondent, but filed nothing further in the reorganization proceeding.

March 9, 1988 –

The Bankruptcy Judge confirmed the Plan of Reorganization. Despite their prior service and knowledge, Respondents did not vote, did not object to the Plan of Reorganization, and did not object to the confirmation.

March 13, 1990 –

Respondent filed his individual bankruptcy proceeding.

The statement of the case as given by the Petitioners contains a considerable quantity of factual allegations about the Respondent, obviously intended to disparage him, but which are simply not in the record. While it is true these unproved allegations are not important to the issue before the Court, still Respondent wants it to be known that he does not concede these unproven allegations.

SUMMARY OF ARGUMENT

There is just no split between the circuits. All Petitioners have located is a District Court opinion stating that there is a division of authority.

To the contrary, it is well established that third party releases in Plans of Reorganization are improper. Nevertheless, if parties with knowledge do not timely object so that a judgment of confirmation is entered, those parties will thereafter be bound by the judgment under standard principles of res judicata claim preclusion.

ARGUMENT

The principles of claim preclusion (res judicata) and the fact that an Order confirming a Plan of Reorganization is a judgment are all well established by prior opinions of this Court.

It is also well established that a Plan of Reorganization cannot release third parties, at least absent very unusual circumstances not present here. What happens, however, if the Plan of Reorganization contains such a third-party release, which could have been the basis of an objection, but no such objection was ever made and the Plan was confirmed? Does res judicata now apply or is the judgment subject to collateral attack?

All authorities concur that res judicata does indeed prevent collateral attack. What Petitioners really present to this Court is not a conflict between the circuits, but a District Court opinion which, in the process of finding claim preclusion, remarks that there is a conflict between the circuits. *F.D.I.C. v. O'Donnell,* 136 B.R. 585, 589 (D. D.C. 1991).

The two cases cited in that opinion do not support the conclusion of a conflict. To the contrary, they are

easily distinguishable. In *Underhill v. Royal*, 769 F.2d 1426 (9th Cir. 1985), the creditors objected to the release provisions of the Plan before it was confirmed. By stipulation, the issue of validity of the release was left for determination by the District Court of a pending class action. This case, then, only supports a proposition not in issue, namely, that a third-party release is not proper in a Plan of Reorganization and is vulnerable to attack before judgment of confirmation is entered.

The case of *Union Carbide Corp. v. Newboles*, 686 F.2d 593 (7th Cir. 1982), involved a plan of arrangement under Chapter XI of the Bankruptcy Act of 1898. The issue there presented to the Court of Appeals was whether the acceptance of a 20 percent dividend from a corporate debtor worked an accord and satisfaction of the individual guarantor under the state law of Indiana.

While the District Judge cited no additional authorities to support the conflict, Petitioners here add *In re Gurwitch*, 794 F.2d 584 (11th Cir. 1986) and *In re Daley*, 776 F.2d 834 (9th Cir. 1985). The first case does not present an issue of a third-party release, but whether the Internal Revenue Service may amend so as to increase its claim against the debtor himself after confirmation. The second case did not involve confirmation or even a reorganization. It dealt instead with a totally different area. The issue there concerned the preclusionary effect of a pre-bankruptcy lawsuit upon the right to object to the debtor's discharge in a later Chapter 7 proceeding. This Court has already explored that subject in depth in *Brown v. Felsen*, 442 U.S. 127 (1979).

There is nothing new or startling in the proposition that claimants, even with meritorious claims, may find themselves barred when they slumber upon their rights. The petition presents neither an important question nor a conflict between circuits requiring resolution.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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